

Appellant-respondent Thomas M. Hill appeals the decree of dissolution of his marriage to appellee-petitioner Sharon Hill and the trial court's denial of his motion to correct error. Specifically, Thomas argues that the trial court erred in valuing and distributing the marital assets, that the trial court erred in ordering Sharon to pay child support from the date of the final decree, and that the trial court erred in ordering him to pay a portion of Sharon's attorney fees. Finding that the trial court erred in its method of calculating the parties' retirement accounts and in granting Sharon a credit for a debt on a vehicle that Thomas and an insurance company had paid, we affirm in part, reverse in part, and remand with instructions that the trial court redetermine the property division. On remand, the trial court shall reassign the values of the parties' pension accounts based upon the date of separation and eliminate the credit that was granted to Sharon with regard to payments that were made on the vehicle.

FACTS

Thomas and Sharon were married and have two daughters. K.H. was born on April 22, 1986, and T.A. was born on August 3, 1989. On September 26, 2005, Sharon filed a petition for dissolution of the marriage and a motion for a provisional order. Sharon requested custody of the children and an order directing Thomas to pay child support. No hearing was held, and within three weeks of Sharon's request for the provisional order, Thomas obtained custody of both children.

From October 2005 until December 2006, there was no activity in the case because the parties were attempting to settle the matter. During the pendency of the

action, Thomas had the exclusive use and possession of the marital residence and both children lived with him.

Thomas filed a “Motion for Hearing Dates” on December 18, 2006, requesting that the trial court set dates for a provisional and final hearing in the matter. Appellee’s App. p. 12. The trial court conducted a hearing on December 29, 2006, at which time the parties indicated that they had reached an agreement for deadlines and would participate in mediation. When the trial court asked the parties if they needed a provisional order, Thomas’s counsel indicated that they were “okay with the status quo.” Tr. p. 6-7. There was no evidence indicating that the parties ever entered into an agreement for temporary support, and there is nothing to suggest that they contracted away any child support obligation.

After the attempt to mediate was unsuccessful, discovery continued and the trial court set the matter for final hearing. The final hearing commenced on July 5, 2007, but it did not conclude until November 2, 2007. Thomas presented evidence that his retirement account—a Thrift Saving Plan (TSP account)—was valued at \$132,502.47 as of October 6, 2005. Thomas testified that he made contributions to the TSP account in the amount of approximately \$205 per pay period after the parties had separated. Thomas also introduced one of his paystubs into evidence in support of his claim. Thomas’s other retirement account was valued at \$64,218.85 at the time of separation, and \$78,299.38, as of the date of the final hearing. Sharon presented evidence that the value of the Thomas’s TSP account was \$149,222.93, on December 29, 2006.

The evidence showed that at the time of separation, Sharon was driving a 2003 Ford Escape SUV. The debt on the vehicle was \$18,611.94, and Thomas continued to make the payments. The trial court found that Thomas's payments totaled \$4,950, and he was given credit for that amount. Sharon and Thomas also stipulated that the value of the vehicle was \$14,365, and following the separation, Sharon traded that vehicle for a different one. However, at some point, the debt on the Ford Escape was satisfied via an insurance settlement because Sharon had wrecked that vehicle. The trial court ultimately attributed the debt to Sharon in the amount of \$11,153.40.

The parties further stipulated that the value of the marital residence was \$100,000. Thomas paid a small amount of the debt that was due on the house after the separation, and the trial court allocated that debt to him. Thomas testified that the residence was in need of repair and that neither he nor Sharon desired to live there after the divorce.

The evidence also established that Thomas cashed in an insurance policy and some savings bonds during the pendency of the action and gave those funds to K.H. and T.A. Sharon testified that she did not have control over those assets and that Thomas made a unilateral decision to give the money to their daughters. Sharon acknowledged that she did not necessarily agree with the making of such gifts during the pendency of the divorce. As a result, the trial court attributed the amounts of those assets, totaling \$7,500, to Thomas.

The evidence showed that Sharon was unemployed for nearly four months after the petition for dissolution was filed. Sharon testified that her annual income was approximately \$19,000 since February 2006. Finally, the trial court allocated a total of

\$7,171 to Thomas that he held in savings and checking accounts at the time of the separation. The trial court used the date of December 29, 2006, in valuing Thomas's TSP account at \$149,222.93, and valued one of Sharon's retirement accounts as of the date of the separation when dividing the assets.

On December 7, 2007, the trial court entered a final decree regarding child support and the distribution of marital assets. The trial court found that Sharon's weekly income was \$359, and Thomas's was \$1000. After determining that K.H. was emancipated, the trial court ordered Sharon to pay child support in the amount of \$39.78 per week, commencing on the date of the order. Finally, Thomas was ordered to make an "equalization payment" of \$161,579.85 to Sharon. More specifically, the order provided as follows:

B. Custody and Support

...

3. The parties' daughter, [K.N.], has become emancipated, she has reached the age of 21, but still has college expenses. That [K.N.'s] tuition and books not covered by grants or scholarships shall be paid 30% by [K.N.], 18% by her mother and 52% by her father.

4. That the Husband is awarded legal custody of the Parties' daughter, [T.H.], subject to Wife's rights of parenting time pursuant to the Indiana Parenting Time Guidelines. Wife shall pay child support in the sum of \$39.78 per week, commencing as of the date of this order. [T.H.'s] uninsured health care expenses shall be paid 74% by her father and 26% by her mother, after her father shall have paid the first \$605.28 of such expenses each year.

THE MARITAL ESTATE

Assets:

1. Home and realty	\$100,000
2. Wife's vehicle (at separation)	\$11,153.40
...	
6. Thrift Savings Plan with USPS	\$149,222.93
7. 401k of Wife with BMV	\$22,461.91
8. F.E.R.S. account with USPS	\$76,988.14
...	

MISCELLANEOUS FINDINGS

1. That the Wife incurred extraordinary attorney's fees to obtain documentation of the Husband's retirement accounts.
2. That the Wife presented evidence of attorney fees of \$6,429.00 prior to Final Hearing of July 2007.

CONCLUSIONS OF LAW

4. That in order to place in force and effect the property division heretofore set out and leave the parties each with the net equity set forth above, the Husband shall pay to the Wife the sum of \$161,579.85 within ninety (90) days of the date of this Decree. He may do this by financing the real estate, and/or by a qualified domestic relations order.
5. That the Husband shall pay the Wife's reasonable attorney fees to Daniel L. Brown in the sum of . . . \$6000 within . . . 60 days of the date of this Decree.

Appellee's App. p. 2-8 (emphasis added).

Thomas filed a motion to correct error on December 18, 2007, alleging, among other things, that the trial court should have ordered Sharon to pay child support retroactive to either the date of the dissolution petition or to that date that Thomas filed a petition for a provisional order. Thomas also asserted that the trial court should have ordered the sale of the marital residence with instructions that the parties split the proceeds, that the value of savings bonds and cash proceeds from the insurance policy that he gave to the children should not have been attributed to him, that the values of the

parties' retirement accounts be "reset consistent with values gained during the marriage, plus reasonable interest," that the trial court should not have granted credit to Sharon for the debt that was owed on the Ford Escape, and that the balances in the savings and checking accounts were improperly assigned to him because evidence of the amounts were not properly admitted into evidence, and that the trial court abused its discretion in ordering Thomas to pay a portion of Sharon's attorney fees. Appellee's App. p. 14-16.

During the hearing on the motion to correct error, Thomas's counsel stated that he was "waiv[ing] any argument as to bank accounts in . . . [Thomas's] name at the time of the . . . dissolution." Tr. p. 210. As a result, the parties did not present any evidence or argument with regard to that issue. Following the hearing, the trial court modified the dissolution decree, which resulted in a reduction of Thomas's equalization payment obligation to Sharon by \$14,415.21. In particular, the trial court's order on the motion to correct error provided as follows:

- a. Husband's F.E.R.S. USPS pension should have be[en] valued at \$64,218.85.
- b. Wife's PERF in the sum of \$3,652.58 should have been shown as property allocated to her.
- c. Husband should have received credit for \$4,950.00 of indebtedness paid on Wife's vehicle.
- d. Debt assigned to Wife's vehicle should have been in the sum amount as the value of the vehicle \$11,153.40.

2. The Equalization payment should be reduced to the sum of \$147,164.64.

Appellee's App. p. 1. Thomas now appeals.

DISCUSSION AND DECISION

I. Division of Assets

A. Standard of Review

In addressing Thomas's contention that the trial court erred in dividing the marital property, we initially observe that a trial court's decision in dividing marital property in Indiana is a two-step process. Coffey v. Coffey, 649 N.E.2d 1074, 1077 (Ind. Ct. App. 1995). First, the trial court must determine what property must be included in the marital estate. Wyzard v. Wyzard, 771 N.E.2d 754, 757 (Ind. Ct. App. 2002) (citing Ind. Code § 31-15-7-4(a)). Included within the marital estate is all the property acquired by the joint effort of the parties. Id. With certain limited exceptions, this "one-pot" theory specifically prohibits the exclusion of any asset from the scope of the trial court's power to divide and award. Id. (citing Coffey, 649 N.E.2d at 1076). Only property acquired by an individual spouse after the final separation date is excluded from the marital estate. Coffey, 649 N.E.2d at 1076 (citing Ross v. Ross, 638 N.E.2d 1301, 1303 (Ind. Ct. App. 1994)).

After determining what constitutes marital property, the trial court must then divide the marital property under the presumption that an equal split is just and reasonable. Ind. Code § 31-15-7-5; Coffey, 649 N.E.2d at 1077. If the trial court deviates from this presumption, it must state why it did so. In re Marriage of Lang, 668 N.E.2d 285, 290 (Ind. Ct. App. 1996). A party who challenges the trial court's division of the marital estate must overcome a strong presumption that the court considered and complied with the applicable statutes. Frazier v. Frazier, 737 N.E.2d 1220, 1223 (Ind. Ct. App. 2000). That presumption is one of the strongest presumptions applicable to our consideration on appeal. In re Marriage of Bartley, 712 N.E.2d 537, 542 (Ind. Ct. App.

1999). We view the trial court's disposition of property in its entirety, and not item by item. Fobar v. Vonderahe, 771 N.E.2d 57, 59 (Ind. 2002). We do so recognizing that the trial court "may allocate some items of property or debt to one spouse because of its disposition of other items." Id. at 60. Were we to view items "in isolation and apart from the total mix, it may upset the balance ultimately struck by the trial court." Id. So long as there is sufficient evidence and reasonable inferences to support the trial court's asset valuation, an abuse of discretion does not occur. Granzow v. Granzow, 855 N.E.2d 680, 685 (Ind. Ct. App. 2006). An abuse of discretion occurs only when there is simply no evidence in the record to support its decision to assign a particular value to a marital asset. Thompson v. Thompson, 811 N.E.2d 888, 917 (Ind. Ct. App. 2004).

B. Retirement Accounts

Thomas argues that the trial court did not properly value the parties' retirement accounts. Specifically, Thomas maintains that the valuation of the parties' respective retirement accounts was erroneous because "the trial court systematically selected the date at which [Thomas's] retirement account was at its highest value through additional contributions while in turn selecting the date at which [Sharon's] retirement account was at its lowest value." Appellant's Br. p. 7. Thus, Thomas claims that the trial court's failure to use the same date in valuing the parties' retirement accounts has resulted in an inequitable and unfair distribution of the assets.

In resolving this issue, we initially observe that the burden of producing evidence as to the value of the assets rests upon the parties to the dissolution proceeding. In re Marriage of Coyle, 671 N.E.2d 938, 945 (Ind. Ct. App. 1996). The trial court has

discretion in selecting any date between the date of filing of the petition and the final hearing to value a retirement account, which is to be guided by the equities in the case. Eppley v. Eppley, 341 N.E.2d 212, 218 (Ind. Ct. App. 1976). The purpose of leaving such a decision to the discretion of the trial court is to prevent the parties from distorting the nature and value of marital property. Id. The valuation of a retirement benefit by the trial court requires it to consider three factors: (1) the evidence required to establish the value of the benefit; (2) the date that must be used to assign a dollar amount to the benefit; and (3) the amount of the benefit's value that was the result of contributions made after the final separation date. Thompson, 811 N.E.2d at 917. The trial court must consider these three factors in concert to arrive at the benefit amount used in the division of the marital estate. Id. Trial courts are entrusted with the discretion to allocate the risk of a change in value of a retirement benefit by selecting a date between the date of final separation and final hearing. Id. at 917-18.

In this case, when the parties separated on September 26, 2005, Thomas's two retirement accounts were valued at \$132,502.47, and \$64,218.85. Respondent's Ex. C, Petitioner's Ex. 9. On the date of the final hearing, those assets were valued at \$149,222.93 and \$78,299.38, respectively. Petitioner's Ex. 6, 7, 9. Although the trial court established the value of Sharon's pension to be divided as of the date of separation, Thomas's TSP retirement account was valued as of December 29, 2006, which was a date closer to the final hearing.

While we acknowledge that the trial court has discretion in selecting a valuation date of the parties' assets between the date of filing and the final hearing, it is apparent

that the trial court used different standards when valuing the parties' pension accounts. Moreover, the trial court considered Thomas's post-separation contributions when valuing Thomas's pension.

The record shows that Thomas continued his employment with the United States Postal Service during the pendency of the dissolution and continued to contribute to his TSP account in the same percentage and amount that he contributed during the marriage. Thomas presented a paystub at the final hearing establishing that his average contribution of \$205.88 per biweekly pay period. Moreover, a detailed valuation of the TSP account was conducted by a pension valuation expert. Appellant's App. Vol 2, p. 3, 22. In essence, much of the growth in Thomas's pension account was attributed to his continued payroll deductions and normal base growth.

Notwithstanding this evidence, it is apparent that the trial court did not take Thomas's contributions into account during the twenty-five month pendency of the proceedings. Therefore, the trial court's decision to choose different dates in valuing the parties' pension resulted in a benefit only to Sharon and a substantial inequity to Thomas. Thus, we must conclude that the trial court's method of valuing the parties' respective pensions by selecting different dates for the valuations amounted to an abuse of discretion.

C. Ford Escape

Thomas argues that the trial court erred in granting a credit to Sharon for paying the debt on the Ford Escape because he continued to make the monthly payments and insurance premiums on the vehicle after the separation. Therefore, Thomas argues that

he should have been credited for the partial payment of the debt in the sum of \$4950, and that Sharon should not have received any credit for the debt because the Escape was ultimately paid for by insurance proceeds.

As discussed above, the evidence presented at the final hearing established that the vehicle's value at the time of separation was \$14,375. Ex. 1. The debt that was owed on the vehicle at the time of separation was \$18,611.94. Tr. p. 61-62. The parties stipulated to the vehicle's value and no alternative exhibits were proffered by counsel for either party. Tr. p. 118. However, the trial court assigned an amount of \$11,153.40 in the final order, which was what the parties had discussed during negotiations.

When Sharon vacated the residence and took the Ford Escape with her, Thomas continued to make the monthly payments and pay the insurance premiums. At some point during the period of separation, Sharon wrecked the vehicle and the outstanding debt was satisfied via an insurance settlement. Sharon then purchased a different vehicle. Tr. p. 61-62.

In light of these circumstances, we agree that the trial court properly credited Thomas for \$4,950, which represents his payments on the vehicle. However, we cannot agree with the trial court's decision to credit Sharon with an amount of \$11,153.40, because the debt on the vehicle was ultimately satisfied with the insurance settlement proceeds. In other words, Sharon paid nothing "out-of-pocket" for the vehicle, and the outstanding debt was necessarily equalized by the insurance settlement proceeds. Therefore, the debt should not count for or against either party, and the trial court should not have credited Sharon for that amount.

D. Marital Residence

Thomas next claims that the trial court abused its discretion when it did not order the sale of the residence and direct the parties to divide the proceeds. More specifically, Thomas maintains because “neither party had a firmly established value nor a desire to maintain the asset, [his] desire to immediately list the residence for sale and to equitably divide the proceeds would have been the most equitable resolution.” Appellant’s Br. p. 18.

The parties agreed that the residence was worth approximately \$100,000. Tr. p. 26. Notwithstanding Thomas’s claim that the trial court should have permitted him to sell the residence and split the proceeds because neither he nor Sharon desired to remain in the house, the trial court is required to equitably divide the marital property of the parties in a just and reasonable manner. Coffey, 649 N.E.2d at 1077. Indeed, Thomas had the exclusive use and possession of the residence during the pendency of the action, at which time he had the duty to maintain and preserve the value of the property. Cowart v. White, 711 N.E.2d 523, 532 (Ind. 1999). To the extent that Thomas did not maintain the residence and allow it to fall into disrepair, he must bear the burden of a resulting decrease in value. Moreover, we cannot agree with Thomas’s assertion that the trial court was obligated to protect the parties from future risks associated with potential losses to the residence. In other words, it was the trial court’s duty to divide the marital property of the parties in a just and reasonable manner, and to exercise its discretion in valuing the property within a time period between the date of final separation and the final hearing.

Thus, we conclude that the trial court did not abuse its discretion in denying Thomas's request that the residence be sold.

E. Gifts of Marital Property

Thomas contends that the trial court erred in assigning the values of savings bonds and cash proceeds from an insurance policy that he gave to the children for educational and transportation expenses to him in the final decree. Specifically, Thomas claims that because the children benefited from those gifts, which totaled \$7500, the values of those items should not have been attributed to him.

Notwithstanding Thomas's claim that only the children benefited from the insurance policy and savings bond proceeds, Sharon testified that she had no control over these assets. She also testified that Thomas exercised exclusive control over the funds when he gave them to the children. Tr. p. 30-31, 59-60, 67, 81. Moreover, Sharon testified that she did not agree with Thomas's unilateral decision to make those gifts during the pendency of the dissolution action.

In light of these circumstances, we conclude that it was reasonable for the trial court to assign the value of the insurance proceeds and savings bonds to Thomas. Thus, his claim fails.

F. Values of Checking and Savings Accounts

Thomas maintains that the trial court abused its discretion in assigning the values of a checking and savings account to him. Specifically, Thomas maintains that the balances of these accounts "were not entered into the trial record properly or by benefit of supporting exhibits." Appellant's Br. p. 13.

Thomas correctly observes that the trial court assigned the assets of a checking and savings account valued at \$7171 to him. Appellee's App. p. 6. Those amounts were based on Thomas's "proposed division of assets" that was provided to Sharon's counsel during the final hearing and marked as "Respondent's Exhibit A." However, the exhibit was not entered into evidence.

Although Thomas raised this issue in his motion to correct error, his counsel told the trial court at the hearing that was conducted on April 11, 2008, that he was "waiv[ing] any argument as to bank accounts in . . . [Thomas's] name at the time of the . . . dissolution." Tr. p. 210.

We acknowledge that a party ordinarily does not waive the right to appeal an issue that is properly preserved at trial—except for newly discovered evidence and excessive jury verdict—if the issue is not raised in the motion to correct error. Ind. Trial Rule 59(A); Marsh v. Dixon, 707 N.E.2d 998, 1001 (Ind. Ct. App. 1999). However, Thomas did raise the bank account issues in his motion to correct error, but he subsequently and expressly waived it at the hearing. Thus, the parties did not address the issue and the trial court did not hear any evidence or argument with regard to Thomas's claim. In light of these circumstances, we conclude that Thomas has waived the issue and he may not resurrect it now.

II. Child Support

Thomas argues that the trial court erred in ordering Sharon's child support obligation to commence on the date of the final decree. Specifically, Thomas maintains that the trial court's order for child support should be applied retroactively to either the

date on which Sharon filed the dissolution petition, which was September 26, 2005, or December 18, 2006, which was the date on which Thomas purportedly requested a provisional order. In essence, Thomas asserts that the trial court's decision not to retroactively apply Sharon's child support obligation unfairly penalized him.

In resolving this issue, we initially observe that decisions regarding child support rest within the sound discretion of the trial court. Haley v. Haley, 771 N.E.2d 743, 752 (Ind. Ct. App. 2002). The reversal of a trial court's decision in a child support award is merited only when the determination is clearly against the logic and effect of the facts and circumstances before it. Fields v. Fields, 749 N.E.2d 100, 104 (Ind. Ct. App. 2001). Additionally, it is within the trial court's discretion to retroactively apply a child support award back to the date of filing, or any date thereafter. Haley, 771 N.E.2d at 752.

Contrary to Thomas's assertion, the record demonstrates that he did not make any claim for child support on a provisional basis. At a hearing that was conducted on December 29, 2006, the trial court inquired whether the parties needed a provisional order, and Thomas's counsel responded that they were "okay with status quo." Tr. p. 6-7. Moreover, at the hearing on the motion to correct error, Thomas's counsel acknowledged that only Sharon had requested for support. Thus, although Thomas contends that he requested an order for support on December 18, 2006, the record is devoid of such a request.

As noted above, the parties had no agreement with regard to temporary support, and Sharon testified that she provided the children with money when she was financially

able to do so. Tr. p. 53. Moreover, the record shows that Sharon was an unemployed student at various times during the separation. Id. at 183-84.

In light of these circumstances, we conclude that Thomas has failed to demonstrate that the trial court's order directing Sharon to pay a specific amount of child support to commence on the date of the final decree was clearly erroneous. Put another way, we cannot say that the trial court abused its discretion when it did not order support retroactively, particularly when Thomas's counsel informed the trial court that he had not made any specific request for support on the date that the provisional order was filed or on any other date.

III. Attorney Fees

Finally, Thomas argues that the trial court erred in ordering him to pay a portion of Sharon's attorney fees. Specifically, Thomas argues that the award was excessive and that Sharon's counsel failed to support the amount of expended fees and did not provide evidence as to whether the rates charged by counsel were commensurate with the standard rates of attorneys in the community. Appellant's Br. p. 20.

We initially observe that Indiana Code section 31-15-10-1 (attorney fees statute) provides:

(a) The court periodically may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this article and for attorney's fees and mediation services, including amounts for legal services provided and costs incurred before the commencement of the proceedings or after entry of judgment.

The court may order the amount to be paid directly to the attorney, who may enforce the order in the attorney's own name.

As noted above, the attorney fees statute in connection with dissolution proceedings is discretionary: it provides that the trial court may order a party to pay a reasonable amount for the other party's attorney fees. Tompa v. Tompa, 867 N.E.2d 158, 166 (Ind. Ct. App. 2007); Thompson, 811 N.E.2d at 927-28. In determining whether to award attorney fees, the trial court must consider the resources of the parties, their economic conditions, the ability of the parties to engage in gainful employment, to earn adequate income, and other factors that are pertinent to the reasonableness of the award. Tompa, 867 N.E.2d at 166; Thompson, 811 N.E.2d at 927-28. Reversal is proper only where the trial court's award is clearly against the logic and effect of the facts and circumstances before the court. Id. Moreover, a trial court is not required to give reasons for its determination. Schacht v. Schacht, 892 N.E.2d 1271, 1280 (Ind. Ct. App. 2008). Finally, we note that a trial judge possesses personal expertise that he or she may use when determining reasonable attorney fees in a proceeding related to dissolution of marriage and has wide discretion to apportion the fees. Mitchell v. Mitchell, 875 N.E.2d 320, 325 (Ind. Ct. App. 2007), trans. denied.

In this case, the trial court was aware of the parties' incomes and earning abilities, and it is apparent that it considered the disparity in income between the parties and the costs associated with discovery for the purpose of valuing Thomas's pension accounts. Appellant's App. p. 5-14. Moreover, the affidavit that Sharon's counsel submitted to the trial court specifically describes each task that was performed at the rate of \$125 per hour, and the total fees that were charged. Id.

Upon reviewing the attorney fee affidavit that Sharon's counsel submitted, we cannot say that the trial court abused its discretion in ordering Thomas to pay a portion of Sharon's attorney fees. Thus, we decline to disturb that award.

CONCLUSION

In light of our discussion above, we conclude that the trial court erred in its valuation of the parties' retirement accounts. Moreover, the trial court should not have granted Sharon credit for the payments that Thomas made on the Ford Escape. However, we find that the trial court properly calculated the amount of child support that Sharon should pay, that the trial court properly valued the marital residence, and that the checking and savings account balances, the insurance proceeds, and the amounts of the savings bonds were properly attributed to Thomas. Finally, we conclude that the trial court properly ordered Thomas to pay a portion of Sharon's attorney fees.

We therefore affirm in part, reverse in part and remand with instructions that the trial court redetermine the property division. On remand, the trial court shall reassign the values of the parties' pension accounts based upon the date of separation and eliminate the credit that was granted to Sharon with regard to payments that were made on the Ford Escape.

Affirmed in part, reversed in part, and remanded.

NAJAM, J., and KIRSCH, J., concur.